In the Supreme Court of the United States

OCTOBER TERM, 1957

No. 491

P. & D. MANUFACTURING CO., INC., PETITIONER

v.

FEDERAL TRADE COMMISSION

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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MEMORANDUM FOR THE FEDERAL TRADE COMMISSION IN OPPOSITION

The principal question presented by the petition is whether the court below unreasonably failed to stay execution of the Commission's order directing petitioner to cease and desist from discriminating in price among its customers until its competitors, engaged in like practices, "can be subjected to similar judgments and orders", thereby "inevitably" causing petitioner serious economic damage (Pet. 2). The question is the same as that presented in *Edelmann & Co.* v. *Federal Trade Commission*, No. 101, this Term (pending on petition for certiorari), where the Commission filed a memorandum which stated that since certiorari review of substantially the same question had been granted in *Moog Industries*, No. 77, this

Term, and was being sought in *Federal Trade Commission* v. *C. E. Niehoff & Co.*, No. 110, this Term,[1] the Commission did not oppose grant of writ of certiorari.

The petition for certiorari in *Edelmann* set forth (pp. 3-4) that the petitioner had sought to introduce evidence to show that its business would be severely damaged by issuance of an order prohibiting its discount practices while its competitors remained free to continue similar practices; that it had made an offer of proof after rejection of such evidence; and that its appeal to the Commission from the Examiners' initial decision had assigned rejection of this evidence as error. In contrast, the petitioner in the instant case made no showing or attempted showing of similarity between its practices and those of competitors, or of injury to it should it be bound by a cease and desist order in the absence of like orders binding competitors. Accordingly, here there is lacking any factual premise for the question presented in *Moog*, *Niehoff*, and *Edelmann*. In addition, petitioner had not requested the Commission to postpone the effective date of any order which it might issue, and the case therefore comes within the rule that on judicial review of an administrative order the reviewing court will not consider an issue not brought to the attention of the administrative agency while it still had "opportunity for correction." *United States* v. *Tucker Truck Lines*, 344 U.S. 33, 36-37.

In these circumstances, the Commission opposes

[1] This Court subsequently granted the requested writ.

grant of certiorari with respect to error by the court below in failing to postpone the effective date of the Commission's order. The Commission also submits that the further question presented by petitioner, whether the decision below and the decision by the same court in the *Niehoff* case produces "an intra-Circuit conflict of decisions", is without substance. The opinion below states (Pet. 3a):

> In *Niehoff* there was evidence in the record that C. E. Niehoff & Co. would be forced out of business if the traditional pricing practices which it then followed would be denied to it; while its competitors were left free to continue such practices. No such proof or argument was made in the case at bar. The suggestion made at the time of oral argument comes too late.

The final question presented (Pet. 3) is whether a quantity discount may violate Section 2(a) of the Clayton Act "without proof of injury to competition". The petition makes no attempt to show that the Commission's finding of injury to competition lacks evidentiary support, and the court below found that "substantial evidence supports the Commission's finding that petitioner's discriminatory prices have an adverse competitive effect" (Pet. 2a-3a). The correctness of that finding presents no question meriting further review by this Court.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

J. LEE RANKIN,
Solicitor General.

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